

A
LETTER
TO A
FRIEND,

IN
VINDICATION of the PROCEEDINGS
AGAINST
Sir JOHN FENWICK,

BY
Bill of Attainder.

With some Remarks on his Printed Paper.

L O N D O N,

Printed for Samuel Peyrick, at *Grays-Inn-Gate* in *Holborn*.
MDCXCVII.

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R. E. R.

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IN
REPLY TO THE PROCEEDINGS
AGAINST
JOHN FENWICK
BY
JOHN OF GATTON

Printed by J. GATTON, at the Press of the
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TO THE
R E A D E R.

I Was never a very great Friend to Apologies; yet I find it necessary, at this Time, to make use of them. I do it for the satisfaction of such who may ask, why this Paper came out no sooner? and, why, after such a Delay, it came out at all? seeing the Business of it, as they conceive, is blown over, and the Town has fresh Subjects to talk of.

For the First, the Delay; a desire of seeing some Memorials not to be immediately had, and of discoursing with some Persons not every day to be met with; a great deal of other Business, and an expectation of something of this Nature from other hands; as they are true Suggestions, so, I presume, they make up a just Excuse.

Concerning the Second, the Unseasonableness of this Account, I take the confidence to say that it seems to me to be a very great Mistake. For there is a Party, (who know better what they are against, than what they are for) whose Heat, tho' very violent, is yet perpetual. This is evident to all who are either so curious as to enquire after the Papers they Spread abroad, or so unhappy as to engage with them in Discourse. The Matter is by no Means over with this sort of Men: The Bill of Attainder is their daily Subject. They are Transport-
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To the Reader.

ed with so great a rage against it, that for the sake of it, they declaim against all Acts of Attainder. Tho' the Memory of Queen Elizabeth is not, upon other accounts, much valued by them; yet, in this Point they represent it as the Glory of her Reign, that no Act of Attainder passed in it. I am not going about to justify all such Acts, or to plead for the frequency of them. But I would, upon this occasion, observe to the Men of this Faction, that Queen Elizabeth did pass such Acts; and that the last, which the late King James passed, was very far from the Reasonableness and Justice either of those in Her Time, or of this in King William's. Queen Elizabeth did, in Ireland,

Act of Irel.

11 Eliz. c. 3.

13 Eliz. c. 5, 7.

27 Eliz. c. 1.

28 Eliz. c. 7, 8.

pass many Acts of Attainder; and, in some of them, great Numbers of Persons were included. And I cannot but take notice, that in the last Act, here cited, for the Attainder of John Brown of

Knockmontin, and very many others; (I think in some of the rest too) the Style runs thus: "It may please Your Highness for the good preservation of Your most Excellent Majesty's Government, and of the good Peace, Unity, and Rest of all Us Your most bounden and obedient Subjects thereof, the Lords Spiritual and Temporal, and the Commons in this Parliament Assembled, that it may be enacted by the Authority of this present Parliament, that the said John Brown, John Bradah, &c. be, and shall be, by the Authority of this present Act, Convicted and Attainted of High-Treason. So that, in the Judgment of those Times, such an Act was not reckoned, Intumane and Unmerciful, and of very ill Consequence to the Publick; but, a present Means to the

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To the Reader.

~~Common Goods~~ That Excellent Queen, who was always the same, could not look upon an Act of Attainder, as merciful in one Country and unmerciful in another.

The late King James, by an Act of a pretended Parliament, assembled at Dublin, May the 7th, 1689, Attainted of High-Treason, above Two Thousand Four Hundred, of the Nobility, Gentry, Clergy, and Commonalty of England and Ireland (amongst whom as there were several Women and Children, so there were some Great Persons, now sitting here in the House of Lords, viz. James Duke of Ormond, Robert Boyle Earl of Cork, John Earl of Mulgrave); the List of whose mere Names fill no less than Thirty Pages in Quarto, close printed in Columns. Where now is the Impartiality of those Men, who will not suffer one hard Word to fall, which may censure King James's Act: whilst with all Buterness they arraign this of King William? Yet in This the Legislative Power found it necessary (at least in one Instance) to exert it self; that Conspirators might not for the future, learn a Method of escaping from Justice, by taking off a Second Witness, by Bribery, Poison, or other evil Means. The Consequence of such Encouragement would be, the endangering of our Religion and Property, and the bringing us to Wooden Shoes, and Deities, of a like Insensible Substance. To me it is manifest, that the Legislative Power proceeded upon the truest, and noblest Principles; I mean those of Justice to the Person and Charity to the Publick. These are founded on true, unbiass'd, and (as I may call it) dry Reason; which is the Soul of Law: whereas the Pity which would save from Punishment such particular Persons as are

Enemies

To the Reader.

Enemies to the Kingdom, and rather justify then acknowledge their Crimes, proceeds from a Judgment so macerated in Bodily Passion (as a great Man speaks) that it is both unmanly and mischeivous. The Mercy of such a Passion is cruel. It says, in effect, to the Chirurgion, You Bloody and Barbarous Man, will you be so unmerciful as to cut off the Gangreen'd Arm? Rather then be so Inhumane to it, let the Body perish.

I hope, that notwithstanding the Clamour of Men, transported with the Heat of Popish Zeal; the Legislative Power will always prefer the publick before the private Good: And the Character of this Reign will be true Clemency; which is on one side fenced against Rigour, and against Remisness, on the other.

A
 LETTER

*Concerning the Attainder and Execution of Sir JOHN
 FENWICK.*

S I R,

I do not wonder to find you concerned to know upon what grounds the *Act of Attainder* was lately carried. The Debates were long, and the contradiction was great. Every thing that is unusual, and that in the first appearances, seems a strain upon Justice as well as Law, needs a Commentary. A short prejudice does sometimes seize one so strongly, that a long Discourse will be necessary to settle his judgment aright: and therefore I shall endeavour to give you as full an account of that whole matter as I have been able to collect, either from what I learned from the *Bar of both Houses* when all were permitted to come in, or from discourse in Conversation afterwards, which, I hope, will serve, without any additions or observations of my own, to help you to see this matter in a clear light, and to take off from your self or others, any Impressions that flying Reports or some short Papers may have made. It has been the more easie for me to procure you such an Authentical Relation of that matter as will satisfie you, because *both Houses of Parliament* did, upon this occasion, slacken their otherwise necessary Rules of having all their De-

bates with shut Doors, and only among themselves. They seemed in that to comply with the Methods of the Justice of this Kingdom; in which *Judges* argue and give their Opinions in *Open Courts*, and in the hearing of all: So, since they brought a Gentleman to a Tryal, they not only heard *Counsel* and *Witnesses* with open doors; but, in most of their deliberations, they acted like a *Jurisdiction* that was neither afraid nor ashamed to own what they did. But, to bring those Debates, of which I was so lucky as to hear a great deal, under some Form, I shall lead you, as they proceeded, by these steps.

1. I shall show you on what reason they proceeded by Bill in this Case.

2. On what reason they went out of the Common forms of Law in Inferior Courts, in some steps that they made.

3. Upon what grounds it was that they judged this Unfortunate Gentleman Guilty: and then,

4. I shall acquaint you with some passages before and at his Execution.

In stating these matters to you, I shall comply faithfully with your desire of knowing what was said of both sides, for, and against every step that was made: as far as I was able to collect from what was said.

It was in general objected that there were Laws, and Courts of Law where Offenders were to be tried.

It was thought a thing of dangerous consequence to proceed against any by Bill, which might have fatal effects, even to the subversion of the Laws of the Kingdoms; which (if in any thing) ought to be observed most sacredly in what relates to the Lives of the Subjects.

It was said, that Factions might prevail in Parliament as well as elsewhere, and what was done at one time would be made a Rule or Precedent to warrant the like at another time.

It was alledged, that Subjects knew the Laws, and how to govern themselves by them, or when they must fall under them; but no Man could know what a Parliament might call or make a crime; and so no man could be safe.

It was yet more necessary that this should be certain in Cases of Treason, where the Punishment went not only to life, but to the corrupting the Blood.

By the great Statute of *Edward III.* the Overt Act must be proved. By that of *Edward VI.* there must be two Witnesses brought face to face: and all these securities were of late reinforced by the *New Act of Tryals in Cases of High Treason*; but all these would signifie nothing, if this Method were taken of attainting men by a Law. This was enforced with a variety of Topicks, as you see the Subjects can well bear them.

But in opposition to all this, it was said, that the Parliament had often proceeded in this method. Very many Precedents were cited of Ancient times; some of these were indeed afterwards condemned, but so were also the Proceedings at Common Law: for partial Juries and corrupt Judges are plagues that have visited us but too often. Therefore it was no derogation from Parliamentary Proceedings, to confess that in bad times they have been unjust and extreme.

Still the Authority was kept up, as that which had been reserved by the *Proviso* in the Statute of 25 of *Edward III.* and though that *Proviso* had not been made, the Nature of this Government of ours in *England* makes it.

It was indeed seldom to be made use of; but when enormous crimes broke out, against which no Provision had been made, Then a Law, as they thought, might declare the Nature of such crimes and apply a proportioned Punishment to them; so in King *Henry VIII.* time, when a Pot full of Pottage was poisoned in the Bishop of *Rochester's* Kitchen, of which some eating of it had died; poisoning was declared by an Act to be High-Treason, and the Punishment of it was to be boiled alive, and the Cook suffered by that Law; which was never censured by any.

When the Nun of *Kent* pretended to Visions, that revealed to her the unlawfulness of that King's purpose of Divorce and of a second Marriage, and that if he did go on to it, he should dye a Villains Death; the Parliament adjudged this to be the

Crime of Treason against the King's Life and Crown; and condemned some to be attainted of Treason, and others of Mifprifion, for the share they had in it. This Sir *Thomas Moore* justified.

It is true, Attainders grew to be much in use during the rest of that Reign which was much and justly censured. These things ought not to come too often; the crimes ought to be enormous, and the Evidence ought to be so full that no doubt can remain of it: Many were then attainted upon Depositions produced without bringing the Witnesses themselves to be examined; the crimes objected were slight matters, some passionate words, some Coats of Arms, some pieces of Embroidery, as in the Case of the Countess of *Salisbury* and the D. of *Norfolk*; but the chief injustice of all was that Prisoners were attainted without being brought to answer for themselves, or to object to the Evidence laid against them. A Parliament was certainly under the eternal Laws of Justice, and therefore it was an injustice never to be excused not to admit men to speak for themselves. One Attainder past in *Edward VI.* Reign, when tho' the party was not heard, the Witnesses were heard; but when the D. of *Somerset* came to be Tryed both for Treason and Felony, he had not the benefit of the Accusers being brought face to face, but was proceeded against upon Depositions read in the Court; he was acquitted for the Treason but cast for Felony, and that occasioned the Act which the Commons Grafted upon a Bill sent down by the Lords in the subsequent Session.

In Queen *Elizabeth's* long Reign there was indeed no Attainder, but there was a very extraordinary proceeding supported by a Parliamentary Authority in a famous tho' invidious Case; and if a Parliament may supersede any of the common Forms of Law they may carry that as far as they see good cause.

In Kings *James's* time those who had been concerned in the Gun-Powder-Treason were by Act of Parliament attainted after they were dead, which was plainly against Law; for when a Man dies, by our Law all his crimes dye with him.

In King *Charles* the First time the much talked of Attainder of the

the Earl of *Strafford* has been generally ill represented; he was attainted upon the Evidence of one Witness, who deposed that he had offered an advice to the King to bring in a Forreign Force to subdue the Kingdom; whereas all the other Witnesses said that by this Kingdom they meant no other but the Kingdom of *Scotland* then in Rebellion, no discourse being of *England*; so whether he said *this* Kingdom or not they could not say, but they understand it all to relate to *Scotland*. Now since the Relative *this*, tho' in general it belongs to the place where one is, yet may well belong to that which was the subject of the discourse, tho' this Kingdom in general is certainly this Kingdom, yet these words *this Kingdom* may be understood of that Kingdom of which they were speaking. The Execrableness of that proceeding was the attainting a man upon a single Evidence when the sense of them was so doubtful, or rather on the contrary when it was so certain that those words were to be understood in another sense. It was therefore the injustice of the proceeding that is here to be accused, and not the proceeding by Bill. For it is hard to tell what any Parliament would do, or rather what it would not do against a Minister who upon their refusing to give all the supplies that were asked, should tell a King that he was absolved from all the Rules of Government, and might bring in a Forreign Army to subdue his People.

In King *Charles II.* time, some of the chief Regicides were attainted after their deaths and their bodies were raised and exposed to infamy, tho' no Law could reach that.

And in King *James II.* time, the D. of *Monmouth* was attainted in absence without assigning him a day to come in, and that upon a Slender proof. By this, not to run backward to ancient Precedents, it is clear that Parliaments are in the constant practise of Bills of Attainder.

But to justify such a way of proceeding two things are necessary. 1. The Crime ought to be of a high nature in it self; who will say but a Conspiracy to blow up the House of Commons, to blow up the Magazines in the Tower, or to burn the Fleet of *England*, tho' in themselves but misdemeanors, may be

be raised by a Parliamentary authority to be Crimes of a higher nature and to be punished accordingly, as poisoning was from being but Felony declared to be high Treason. 2. Another thing is that the Evidence must be certain, so certain that none can doubt of it. When these two are observed no injustice can be done; and certainly tho' forms are necessary for all the Inferiour Courts of Justice, yet the Supreme Authority is above them, and is under no other rules but the rules of Justice and Equity.

This Government has a peculiar felicity belonging to it, that it admits of no Torture; every one will acknowledge that it is a felicity, and it is so peculiar to us that no Government now in the World, the freest not excepted, has shut it out, but this only. But to ballance this when Cases happen of great consequence, and notoriously evident, in which all the ordinary forms of Law cannot be observed, the legislative Authority may and must interpose, otherwise the Publick might be endangered by too scrupulous an adhering to forms.

The *Romans* who of all Nations both understood Liberty the best, and liked it the most, reckoned that sort of Justice was indeed never to be departed from; but their Laws might be superseded; sometimes they put all in the power of the Consuls with a *viderint Consules*, &c. when the danger was more extreme a Dictator was made in whose breast all the Laws were lodged. In great Cases the People judged and sometimes in a very summary way with great regard to Justice, but little to Law, when it seemed to stand in the way of Justice: And yet in all the time of liberty, there were not above three condemned for affecting to make themselves Masters of their Liberties.

The *Portian* Law had secured all the *Roman* Citizens from Capital Punishments, yet a few years after it had passed, a whole legion having perfidiously fallen in upon *Rhegium*, the *Romans* without regard to that Law put them all to death, such regard had they to Justice.

In all free Governments, there are extraordinary methods for extreme Cases, and tho' Courts are justly put under Rules yet that superiour authority is above all. Such were the *Dictators*

tors at Rome, such are the *Inquisitors* at Venice (not the Ecclesiastical but Civil Inquisitors) such are the Chambers of Justice among the *Grisons*, and among all out of *England* upon a credible tho' but single Evidence Torture is made use of.

In *England* Tryals of Treason went at first at large by the Common Law, till the Statute of *Edward III.* hath both limited the Crimes and the Evidence. This had still a reserve in it for a Parliamentary proceeding, which amounts to this, that as to Evidence, Parliaments may proceed as Juries do in case of Felony to cast the Party upon a single Evidence with strong Presumptions, and that as to the Nature of Crimes such actions as do in their own nature tend to the destruction of the Government, tho' not enumerated in that act, may by them be declared to be High Treason. There is no occasion for this in the present case; that is, for declaring it by any new Act to be Treason; The inviting of a French Army into *England* being certainly High Treason.

As for its being a Precedent, it is, only a Precedent to a Parliamentary proceeding. When any Parliament has a mind to proceed in this way, they have already Precedents enough: A new one after so many does not make the matter much stronger. If they had none at all, their supreme power sets them above all forms and rules except that of real Justice. They must take care of the publick, and secure it from danger. They must not put an innocent man to death upon no account whatsoever, that were murder in them. The greater their power is the more careful they ought to be in the use and application of it. *England* is safe while in the hands of a Parliament. They are in their own hands, in the hands of their Representatives. But if ever the Nation is so unhappy as to make a very bad choice, it must perish, whether a body so ill composed had Precedents or had them not for what they were about to do. This great Authority must be applied with great care and caution. The nature of the fact must be enormous, and highly so (as has been before observed) otherwise it does not deserve their regard; even tho' it might be very criminal: And what can be more enormous;

enormous than to treat and send Messages to invite over a *French* Army? It were invidious as well as it is needless to aggravate this which carries in it all the miseries imaginable that can happen to a Nation, and that from our being the happiest would soon render us the miserablest Nation-upon Earth. We have all seen during the progress of the War, a Body of unnatural men among us that were visibly favouring our Enemies in instances that have been too publick and scandalous to need to be insisted on. To these we may justly impute both the length of the War, and the dangers we have been in, of being twice surprized by Forreign Invasion from *La Hogue* and *Dunkirk*. To this all the dangers the King's Person has been in of Assassinations may be also ascribed; and with respect be it said, the assassinating the Kingdom, to which the other was to make way, was much the blacker Crime. Confusions among our selves, tho' they may throw us into great Convulsions, in which our Kings may have a very dismal share, as happened in the late Wars, yet they may have their *Crisis*. The Nation came again to it self in the year 1660. and all things returned to their former State. But a Forreign Conquest enslaves us and our Posterity for ever. And whereas it was said by the Council for the Prisoner, that this Gentleman was not so considerable that the safety of the Government could be in danger by his means, and that therefore it was not necessary to proceed against him in so extraordinary a manner; which was urged in words not very decent, expressing a contempt of a man of Birth and Quality: But to this it was answered, that the Crime and not the man were to be considered. The inviting over a *French* Army was so heinous a thing, that on whomsoever it fell it must fall with all its weight. It must not pass over as a slight matter besides that; he at the Head of the 2000 Horse that were promised was not so inconsiderable. If such Invitation had encouraged the *French* to undertake the Invasion last year, that was so near proving so fatal to *England*, such a Crime being of the highest nature is very proper for the Supreme Authority

thority to proceed in; sure there may be defects in the Evidence, which the Courts of Law cannot and ought not to supply. And, as to the evidence, this ought to be laid down for a foundation, that it ought to be certain; such as no man doubts of, or can well make himself doubt of; for if there appears no more but a just suspicion after the whole is taken altogether, certainly in that case the Prisoner ought to be acquitted. But if the Evidence comes so home, that if a Jury were to try one for Felony upon such proof, it cannot be supposed that they would go from the Bar, then, tho' there should be such defects in it, that by the rules of Inferior Courts, and by the Law lately passed, a man could not be reached upon it; here would be a strange return to the Crown for passing such a Law, in which a particular Exception was made as to proceedings upon Impeachments, or other proceedings in Parliament, if upon new and strange Emergents, and when we were so lately in such visible and imminent danger, the Parliament would not proceed according to that power, that was inherent in it, and had been ever reserved to it. They were to arrive at Justice whatsoever might lie in their way. Justice was still to be sacred: God forbid an innocent man should suffer; but he was a wise King as well as an inspired Writer, who had made the acquitting the Guilty, a Crime equally odious with the condemning the Innocent.

Thus I have given you as fully as I could gather it, the summ of the Argument as to the matter in general. This was the finest part of the debate, and that of the most lasting use; here it was (as far as I could collect) that the much greatest part of those that liked not the Bill did stick: for besides the aversion that all men have for meddling in Blood, many thought this might be made

a common practice. They could not see how far it might go, and therefore thought it safer to let the Bill fall, then to revive, or, at least, fortifie that which might become very dangerous in its consequences. For I am apt to think they had no concern for *Sir John Fenwick*, and did not doubt of his guilt, only they had an aversion to the Precedent: And of those who argued for it, I know diverse, who had great tenderness for the matter, and much for *Sir John* in particular: But since they thought the thing just in it self, the circumstances of Affairs both at home and abroad, made them conclude it to be necessary to pass a Bill of that nature when it was once moved; since the rejecting it would have given great Cause of Triumph to our Enemies, and must have very much disheartened our Friends and Allies. This was not to be considered, till the Justice of the point was first settled; for that would be, as if a man were to die, because it was expedient he should die: but if it appeared to be just, then the expediency of it had great weight as to the passing the Bill.

The *second* Head of which I promised to give you an account, is the reasons, on which some steps were made out of the common Forms of Law. It was first in general urged, that here in a matter of Judicature the Commons assumed an equal share with the Lords; and more particularly, that they who could not so much as tender an Oath had yet judged a man Guilty of Treason, which seemed contrary to natural Equity. To this it was answered, it was certain that in the way of Judicature the Commons could only be the Accusers, and the Lords were the only Judges; but when they proceeded in the way of Legislation, both Houses must concur. This was the fate of all Bills of Attainders; some of these Bills were begun in the House of Commons. In *Henry VIII.* time, tho the Bills began in the House of Lords,

Lords, yet several persons names were added by the Commons, which was the beginning of it as to those persons. That of the *E. of Strafford* was begun by the Commons, so was also the latest *Precedent*, that of the *D. of Monmouth*. It is true the Commons cannot tender an *Oath*, yet matters of Justice do oft pass upon a bare deposition where the Law do's not suffer an Oath to be tendred. So the acquittal in *Tryals of Felony*, and, till the late Act was past, in *Tryals of Treason*, was upon *Depositions* that could not be upon Oath: Yet they might be believed, and Juries must give their Verdicts upon them if they believe them; so the Commons believing the Depositions might upon these pass the Bill, tho' no Oath could be tendred.

Another step to which great exception was made, was the the reading of *Goodman's Deposition*. It was said this could not be admitted by Law. The Prisoner could not have the advantage of cross examining him, since he did not appear face to face as is required by Law; nor was it proved that *Sir John Fenwick*, or any imployed by him, had any way perswaded *Goodman* to withdraw himself: It would be of very dangerous consequence if a man so accused should be condemned; for by this means a Witness, who, if produced *viva voce* to accuse a man, could not hurt him, being found insufficient to convict him, yet should have more power to hurt him by his absence than if present.

To this it was Answered, that it was a known maxime, that the Practice of Parliament was the Law of Parliament: and the constant practice anciently had been to read *Depositions*. It is true, they were afterwards to consider of what importance such Depositions were, and what stress was to be laid on them; therefore there was Precedent enough for

reading them; yet in Justice they ought to weigh every thing that could be offered to derogate from their credit: as they were to hear every thing that was offered to defame him or to lessen his credit. Might it not be urged as well against the Attainting men after they were dead, that they could not cross interrogate Witnesses, nor offer Proofs for their own justification. In such Cases there must indeed be such a fulness of proof, that it may appear that all exceptions are vain allegations, and no great weight was to be laid on such objections.

Another step was the examining the Grand Jury-men, who had found the Bill against *Sir John Fenwick*, as to the Evidence, that *Goodman* had given before them against him. Those who had been of Mr. *Cook's* petty Jury were also examined as to the Evidence that *Goodman* gave in that Tryal. The *Kings Council* moved this, that by it, it might appear that *Goodman* had been always constant in his Evidence.

But to this it was objected, that it was against Law: Those of the *Grand Jury* were under an Oath not to reveal the secrets that were before them; whatsoever was sworn before them was all to be examined over again in the Tryal; so that could not be brought as part of the Evidence, and those who had tried another man were not to be brought as Evidence, as to what had passed in a Tryal to which *Sir John Fenwick* was not a party. It was also observed that those Jury-men varied in the report they gave of *Goodman's* Depositions.

But to all this it was answered; that Evidence might be brought

brought to prove a presumption as well as to prove the main thing in issue. For since *Goodman* was gone, if any use was to be made of his Evidence, it was a strong presumption either for or against it, if it should appear that he was constant or, that he varied in it. The Parliament was now *searching* to find out truth: so every thing was to be followed that might help towards that. They were afterwards to consider what use they might make of it; so tho' it might be against the Forms of Law, yet in the way in which they proceeded at present, it was very proper for them to examine into it. As for the *Oath of the Grand Jury to keep the Evidence secret*, it was an Oath in favour of the *King*; that so the Evidence might not be known to the Prisoner, till he should be brought to his Tryal. Since therefore this was an Oath to the King, they who were brought thither by his Council were freed from the obligation of it; and since this was indeed *Sir John Fenwick's Tryal*, the end of the Oath was already Answered, so that it did not bind them to conceal the Evidence that had been given before them.

As for those who had been of *Mr. Cook's Jury*, their Oath was not to be Evidence against another Person; It was only a Circumstance that might direct them to judge what value they ought to set upon *Goodman's* Depositions. As for the disagreement that might be among them, the Jury-men themselves, when first called in, declared they could not be positive in it as to particulars; because it was a good distance of time, and they had not sufficient notice to think and recollect. And as to the disagreement, it was not in the charge it self, nor the matter alledged against *Sir John Fenwick*, but it was only in some small circumstances, in which men might vary who had heard the Deposition but once; and so, are not like a
Witness

Witness to a fact, that he has seen or known, which he is supposed to reflect oft upon; nor do they consider more upon such occasions, than whether the Evidence is so well made out, that they can give a general Verdict upon it.

They therefore might misremember themselves as to some particulars which were of less consequence, that would undoubtedly be observed when it came to be debated how far *Goodman's* Evidence was to be made use of, or to be depended on; which was afterwards little insisted on, and seemed rather to be brought to shew the fairness of the proceeding in the whole matter, than to draw any Inferences from it to hurt the Prisoner.

I come in the next place to tell you what the Evidence was, upon which Sir *John Fenwick* was believed Guilty. I need not report Captain *Porter's* Evidence, it being so oft in Print, as to this particular, both in Sir *John Friend's*, in Sir *William Parkin's*, and in *Peter Cook's* Tryal. All that was special here was, that he said that the Lords left the rest of the Company about Five of the Clock, but he could not tell whither he went when he left the House, nor whether he went home that or some following Nights. All the People of the House where they dined were examined, who all deposed, that they were often coming to the Room where that Company was, the Doors being all the while open; that they saw not *Goodman* there, nor had ever seen him there, as they remembred at any time; they believed he could not be there at that time. They also said that the Lords went away about Four of the Clock, and to that particular divers other Witnesses were examined, who all agreed that
it

it was about Four; so tho' some of these Witnesses were not much considered, yet that matter seemed to be agreed on, that they left the House about Four of the Clock; whereas *Porter* swore it was about Five. *A Record of Man-slaughter* was also brought to lessen *Porter's* credit; and whereas he said he could not tell when he went home, it was urged, that from thence it must be concluded he was drunk, and so could be no proper Evidence to what past when he was in such a condition; some disagreement was also observed in the Printed Trials between the Evidence he gave as to *Charnock's* coming to him after his return from *France*; in one it being that he came to him after his Confinement to *Newgate*, and the other after he was freed from his Confinement. This was much insisted on, and upon this it was said, that as he was the single Evidence, so he was a very doubtful one. To all this it was opposed, that by one unquestionable Evidence it appeared, that *Goodman* had once dined in the House with *Sir John Friend*, so he was known to the House; and by another it was proved that he had given direction to call for him that very day at that House, so little credit was due to the People of the House. As for the hour of their parting, when the days are so long as in *May*, no man can be positive to an hour except some circumstances oblige him to attend to it. A man may think it is *Five*, when it is but *Four*; time seemed to move quicker or slower as People were in haste or weary; so no stress could be laid on that. It is but an Inference that he was Drunk, because he did not remember when he went to his Lodgings; other considerations besides that might make a man, who was too much a libertine, not be able to give an account of himself. The record of Man-slaughter did not at all affect his fame or credit in what he Deposed upon Oath.

The varying in the Tryals was occasioned by the difference between the *Short-hand-writers*, one had Writ all the Depositions one way, another had varied in some. The Witnesses had complained to my *Lord Chief Justice*, after the Tryals came out, that their Depositions had been wrong taken; one of the *Short-hand-writers* was not placed so advantageously as the other; besides that the mark in *Short-hand-writing* that distinguishes between these two after he was confined, or after his confinement was over was so inconsiderable, that the exactest Writer might mistake; so the insisting so long on this was much wondred at.

Upon the whole matter it was said, that though a bad man was at first a doubtful Witness, yet after so many Tryals, so great a canvassing to find matter to object against him, and that not one point he had sworn was ever disproved, or so much as denied, by any who had died upon his Evidence; all this confirmed his credit beyond the possibility of calling it in question.

They who had suffered, had studied to cover the Late King all they could, and denied that they had seen any Commission from him for Assassinating the King; but in this they did not contradict Mr. Porter, he spoke not a word of a Commission to assassinate the King, but only of a Commission to attack and seize his Person, which none of them denied.

If in any circumstances he had sworn wrong, they to discredit him, and to save their Friends, could not have omitted to deny and contradict it. This not one of them has done: Sir J. Friend and Sir W. Parkins had this very matter objected

objected to them, it was a part of the Evidence against them, yet they died without denying it; which is not possible to suppose they would or could have done, if it had been False; since it would have discredited the Evidence, and so have been a means to save their Friends. This is the nature of a violent Presumption, which really goes further, to satisfy a Man's Mind, than ten Witnesses; for one may suspect them all how full or home soever they may swear: but this forces it self so upon a Man, that it determines his Assent, he believes it because he cannot doubt of it; and therefore they concluded that Capt. Porter was not a doubtful Witness, but an undoubted one, since his Evidence was fortified with so many violent Presumptions as every one of the dying Men had given to it; but most particularly by what *Friend* and *Parkyns* had said, who justified themselves in what they had done, but denied no part of that which was objected to them. This is more than any Jury in Cases of Felony would require to determine them to bring in their Verdict, and so must be enough to determine the Houses of Parliament.

Goodman's Evidence was not much insisted on. It was proved that he had been a common High-way-man; a Record was brought of designing to murder two of the Dukes of *Cleveland's* Sons; besides most horrid Blasphemies, that could scarce be heard with Patience. It was not proved that any in Sir *John Fenwick's* Name had practised with him to withdraw, so it might be presumed that Horror for his false swearing might have been his Motive. To all this it was said, that tho it appeared that he was a very wicked Man; yet since these Persons, as it was proved, had kept him Company much, they made him a more creditable Witness against themselves, than he could be against any other Person. The concurring Circumstances in this Matter gave Credit to his Testimony; for as to Black Things, very wicked Men, when supported by other Presumptions, must be credited, since such Persons are the only proper Tools to be employed on such occasions. It is true, it was not proved, that any in Sir *John Fen-*

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wick's

wick's Name had practised on him to go out of the way : But a Practice of corrupting *Porter* to go out of the way had been fully proved ; in which Lady *Mary Fennick*, and Sir *John's Solicitor*, had been concerned ; which gave a strong Presumption against him, and a just cause of Suspicion, that he was also concerned in the withdrawing the other Witness : But that was only a Suspicion.

Another Practice that was proved to be carried on to discredit his Evidence was also brought as a Presumption ; but that gave only occasion to another Suspicion as to the withdrawing of *Goodman* : So the Business of *Goodman* was little insisted on.

Another Matter was more urged ; when Sir *John* was first taken, he writ a Letter to his Lady (which was taken from the Person to whom the conveying it was committed) ; in it, besides many other Directions, (by all which it appeared he looked on his own Case as desperate) he advised her to try, by Money, to gain some of the Jury, to *starve the rest* ; and added, *that or nothing must save my Life*. This was then brought to the *Lords Justices*, (as was testified at the Bar of the House of Lords) : And upon his first Examination before them, in which he denied every thing, they told him he was not of that Mind when he writ that Letter, which was then shewed him ; to which he said nothing, but laid it down, and was silenced by it : That was considered as an implicit confessing of it.

Some thought to have taken off this, by saying it was like the proceeding in Col. *Sidney's* Case, upon the Similitude of Hands ; but the barbarousness of that Case was, that a Book found lying in a Man's Study, writ many Years before, was brought to supply the want of a Second Witness, of a Treason of a few Months standing. It could not have been denied, but that if there had been Witnesses against *Sidney*, tho' doubtful Ones, it was a violent Presumption to support their Credit ; If it appeared by a Book of his own writing that he thought Kings might lawfully be put to Death. This was not urged

as

as an Evidence but as a violent Presumption, that Sir *John* knew himself Guilty, and such certainly it was. But as *Sidney's* Case was urged, so the Lord *Russell's* Case was also insisted upon, which had been ever thought hard that upon some transient Discourses he had been condemned, and it was alledged that these were only Discourses at a *Tavern*; But there was a vast Difference between the *one* and the *other*. In the *L. Russell's Case* there were only Discourses of the feasibility of Seizing the *Guards*, but nothing was resolved on: And not one word was sworn to have been spoken by him. Whereas, here, a Messenger was agreed on, a Messenger was sent to invite over a *French Army*; which were plainly *Over't Acts*.

The last thing I shall take notice of is, the Delay used by Sir *John*, after his Apprehension; According to the Contents of the Letter to my Lady *Mary* (which was talk'd of in *Kent* soon after 'twas written), very Sedulous Endeavours were used to have his *Trial* postpon'd; That seem'd to be upon some Design, which he trusted to more then his Innocence. *Goodman* having been Apprehended, and Evidence having been given by him against Sir *John Fenwick* before a *Justice of Peace*, the *Grand Jury*, and *Petty Jury*, upon the *Trial* of Mr. *Peter Cooke*, who was Condemned upon that Evidence: They saw that what was sufficient to Convict Mr. *Cooke* was sufficient to Convict Sir *John*; the Evidence being as strong against the one as the other.

Now what Course could be taken? One was a Pretence to make a Discovery, and to get time by sending a Letter over Sea to the King; in which ('tis said) he informed against several, both Lords and Commons, only upon *Hear-say*: In the mean while saying little that, after the Act of Grace, could touch his own Party, tho it might be presumed he knew more of them then others.

Another Artifice (and which all this Train seemed to lead to) was to prevail with *one* of the *Witnesses* to withdraw. *Porter* was first tryed; but he was not to be dealt with (as they perceiv'd): No Money would buy him off, nor was he to be wheedled, or frighted.

But at length, by some Means (and what they were, we may guess by their Attempt upon *Porter*); *Goodman* went out of the way.

Which being effected, *Sir John* was safe (since the late Act requires two present Witnesses) *for without a Bill of Attainder it was impossible he could fall under the Sentence of Death*, as he sayeth in his *Last Paper*.

This was a more effectual Course then to get *Two or Three who could starve the rest of the Jury*: So he gives Direction in his Letter to my Lady *Mary*, if my Memory does not extreamly fail me; adding, *That or nothing can save me*.

This, *Sir John* depended so much upon, that, upon *Goodman's* Absconding, he let fall his Pretences of making a Discovery for the present.

But this Bill having passed the Commons, was brought up to the Lords; where after a full and long Debate, and before the *Third Reading*, *Sir John* was askt what he had to say; he desired (as I was informed) *three Things*.

1. That (according to what had been at first promised by the Lords) what He should say in that Court might not be made use of against him in any Inferiour Court; and also that he might have an Assurance of it from the *King* (for so he all along called him, tho the Paper-writer gives Him no other Title then *Prince of Orange*.)

2. That he might have a *Pardon* before he Confessed.

3. That he might not be made use of as an *Evidence* after it.

The King was Petitioned by the Lords for the *First*, and it was granted.

The *Second* (it seems) was thought unreasonable; but yet (as I have heard) so far complied with, that he was told, If he made such a Confession as would be satisfactory to that House, they would therein also intercede with the King; and bid him rest assured that they did not then doubt of the King's Favour, as to both the Last.

But he did not think himself Secure, as he said, and so the Bill passed.

Thus

Thus I have given you, in as few Words as I could, the summe of this long Evidence: What remains but to consider the *Circumstances* relating to it, so far as I was enabled to learn.

One main part of which was a Petition delivered by the Lords, at the Lady *Mary's* Request to the King, for a Suspension of the Execution for *eight Days*, to which the Narrative was annexed, signifying that when time was he had saved the King's Life; and besides it was alledged that he wanted the Assistance of a Divine. The Former was of no force, for this Act (which he now challengeth to himself the benefit of) was a Year before the last intended Assassination, and the Assassines were such as he freely and intimately Converſed with afterward; and yet he gave no Notice of it to the King nor to any one else that I could hear of; which if he had, Sir *John* would most certainly have made use of this Pretence in the Paper delivered to the Lords, and at his Death have justified himself upon it. The Neglect of which before, and the Omission of it afterwards, gave too great reason to suspect that it might be with him as it was with *Lowick* and *Rookwood*, who abhorred the Fact, but thought themselves however obliged, contrary even to their own Sense, to obey Orders; according to the Commission which *Crossby* assured them he saw Signed by King *James* at *St. Germain's*, and was sent away for *England* before he came from thence.

*Vid. Rookwood's
Tryal, pag. 52.*

So *Knightly* abominated the Thing as much as any Man Living; yet under some honourable and fair Pretence became so far engaged, that by a mistaken Notion of Honour he thought he could not retreat without the Infamy of Cowardise; to use his own Words which were read in Court, when he came to be tried.

The latter Pretence is frivolous. [That he had no Ministers,] for (I have been credibly informed) that he had first of all the offer made of any of the Clergy that had taken the Oaths; and among the Bishops, such as had dissented about the Bill of Attainder. And when that was not accepted, he had his choice of three or four Non-jurants; and by their Refusal had made it necessary to the Government to permit none at all, or the late Bishop

shop of *Peterborough* only; since the others that were Non-jurants refused to attend him, upon pretence that they might have the Oaths tendred them, and so stand convicted: A Pretence that *Dr. White* and all the Non-jurants were alike liable to: But surely when they might have had leave from the Government to go, they might as well rely on the Justice and Honour of the Government as live under the Protection of it.

I come now to the last part, which I promised, which is to make some *Reflections* upon the *Paper* which he delivered to the *Sheriff*.

Of what stamp this writing is we may easily judg. The Artificial Contrivance of it, the little Avoidances, and Cautions stuck in every where, shew that they are not the words of one that had *no Talent in writing*, nor the free and undisguised thoughts of one that was immediately to dye. He professes to dye in the Communion of the *Church of England*; but whether this Paper be consistent with the Simplicity and Candour taught and required by that Church, especially in our last Hours, let the *Reader* judg.

It doth not mightily concern the World to know what Religion Sir *John Fenwick* was of. I know no Perswasion over zealous to challenge him as theirs. I fear he was rather of a *Party* than of a *Religion*; and that was the Cause he died in. I acknowledge there was a Design of a Party to have made him a *Martyr*, as they had contrived in: If the Second Petition offer'd to the Lords had been received without Alterations; and when presented to the King; had been entirely complied with. If he had been respited for eight Days, according to the Petition, he had then suffered on the 30th of *January*, the Anniversary of a Noted *Martyr* of Blessed Memory; with whom he was not fit to be so much as named the same Day.

He saith, *My Religion taught me my Loyalty, which, I bless God, is untainted: And I have ever endeavoured, in the Station wherein I have been placed, to the utmost of my Power, to support the Crown of England in the True and Lineal Course of Descent without Interruption.*

Now

Now I would know what is meant by the *True and Lineal Course of Descent*? If he means thereby the next in Blood without any Interruption, where is this always to be found? not in our *Histories*, nor in our *Laws*. *Edward the Confessor* (whose *Cross* was some years since so much revered by the late King, and who himself was esteemed a Guardian Saint) broke that *Lineal Descent* both in taking the Crown and leaving it at his Death; and whatever is due to the *Blood*, was never thought absolutely due to the *Person*, nor to the next in this *Lineal Course of Descent*.

Neither our Religion nor our Law teaches such a kind of Loyalty. It is not our Religion but the Law that determines our Loyalty as to the particulars of it; and so far, such as our Law determines our Loyalty to be, such doth our Religion determine it. Now what Law is there to keep a Prince by violence from leaving his People? That requires us to support the Crown on him, that will hold it upon no other Terms, than that his Will and Pleasure may be above it? What Law that obliges us to adhere to and assist *Him*, that, contrary to our Oaths of Allegiance and Supremacy, as well as those at his own Coronation, will Subjugate his People to a Foreign Prelate or Potentate? And that would put himself wholly in the Power of such a Prince, whom above all in the World his People had no reason to expect Favour from? I know no such Law, nor any such Church of *England* that teaches such Loyalty, in any of those Books that are the Standard of it. And yet this is the Loyalty he (as he professes) dies *Innocently* for, and which he endeavoured to the utmost of his Power to support.

But farther, who is concerned in this *True and Lineal Course of Descents*? it is, in his opinion, the pretended *Prince of Wales*; whom he prays for in the Conclusion, and of whom he saith, *it is impossible the Nation should prosper, till the Government is settled upon this right Foot*. A Pretence which their way of Proof made at the best very doubtful. And we know, who once said it, that *in dubiis melior est conditio possidentis*. Certainly we shall be upon a very wrong Foot if we depart from the *Act of Settlement*. He

He goes on, *As for what I am now to dye, I call God to witness, I went not to that Meeting in Leadenhall-street with any such intention, as to invite King James by Force to invade this Nation; nor was I myself provided with either Horse or Arms, or engaged for any number of Men, or gave a particular Consent for any such Invasion, as is most falsely Sworn against me.*

But what is become of the other Meeting at Mrs. Montjoy's? that's perfectly dropp'd. And as for this at Leadenhall-street, that he cannot deny; nor doth he venture to call that part of the Evidence in question, which speaks to the Time or Persons, or the Matter then discoursed upon.

But what hath he then to say? He came not thither *with any intention to invite King James by Force to invade this Nation.* Was this sworn against him? It was not the *intention* before hand, but the Subject matter of the Discourse that was proved upon him; if there was nothing of that Kind, no Design formed, no Message nor Messenger sent to invite King James, that is as soon denied as the *Intention*. But of that nor a word.

But, however, he betakes himself to another Shift, *viz. He was not himself provided with either Horse or Arms, or engaged for any number of Men.* A very doubtful way of Expression. *He was not himself provided;* but what need was there of a present Provision, when the Service was to beat some Months distance? or what if he was *not himself provided*, if it was to be provided for him? What need of any such Provision, when (as it was confessed) they were upon the Instant to seize Horse and Arms when occasion should be. And so it was formerly in the *Gunpowder-Treason*.

He saith, he was *not engaged for any number of Men*; but was he not one of those that were to raise 2000 Men in the gross, and it was not necessary the *Quota* of each particular Person should at that Meeting be set out.

He goes on, *Nor did I give particular Consent for any such Invasion;* that is not so charg'd upon him. All rose up and said to Charnock, *Yes you may.* Whether it was general, or whether it was a *particular Consent*, is not the Point. The *Consent* it seems

seems is not denied; And then where the Perjury is we are yet to seek.

He proceeds, and *I do also declare, in the presence of God, That I knew nothing of King James's coming to Calais, nor of any Invasion intended from thence, till it was publicly known: And the only Notion I had that something might be attempted, was from the Thoulon Fleet coming to Brest.*

If this is true, it is evident the English were trusted with no more of the Secret than was absolutely necessary. It was found fit that the *Assassination* should lye upon them; it was a desperate piece of Service, and if those forlorn Wretches perish in it, let them perish.

But as to the Invasion, the *when*, and the *whence*, it was lodged with others, to whom the Profits and Advantages of a Conquest were reserved. It was sufficient that when these Conspirators heard the *Thoulon Fleet was come to Brest*, then upon this *Signal*, they were to be in readiness, and with the *Horse* they *had* or could *seize*, were to make their way as they could to the Coast, when they heard their Friends were landed. This, it seems, was the *only Notion* Sir *John* and the rest (I suppose with him) had of the Invasion; and he saith, he knew it not till it was *publick*.

The Information he gave, he is willing to make the best of in the next Paragraph; for, saith he, *I also call God to witness that I receiv'd the knowledg of what is contain'd in those Papers, that I gave to a great Man that came to me in the Tower, both from Letters and Messages that came from France; and he told me when I read them to him, that the Prince of Orange had been acquainted with most of those things before.*

This was what he himself did not believe when he talk'd of it long before (as one has affirm'd), but yet was pleas'd with it, because it *would create Suspitions and Jealousies.*

He acquaints us with another part of the *Secret*, that the *Great Man*, to whom he imparted it, could tell him the *Prince of Orange had been acquainted with the most of this before.* But what was it? Not that the *Great Man* knew of these *Lords* and

Commons he accused, but of an Intelligence in general that passed between *England* and *France*.

As for his Expectation of Mercy from that Prince whose Life he pretended to have sav'd, it has been already consider'd.

He goes on, as he began, with a profession of his Innocence, the accusing others of seeking his Blood, and charging the guilt of it upon the whole Nation; for saith he, *I beg of God to pardon those who with great Zeal have sought my Life, and brought the Guilt of my Innocent Blood upon this Nation; no Treason being proved upon me.*

Other Malefactors may as well accuse the Judges and Juries, and Courts of Justice for seeking their Life, when they are Convicted, Condemned, and to be Executed for their Crimes: But why doth he thus arraign those that were concern'd in the Bill? Was he indeed Innocent? Was no Treason proved upon him? This he saith, and saith it when he comes to die. And yet if we believe, not the Evidence of others only, but himself, it is plainly otherwise. What was the meaning of his Confusion in his Letter to his Lady?

What becomes of his Privy to the first Design of the *Assassination* which he did not discover? What of his Offers to confess again and again? What of his owning the Meeting, the Design, &c. How then is he Innocent? No, saith he, *no Treason being prov'd upon me.* Was there no Treason in inviting a Foreign Force? no Treason in joyning with it? no Treason in holding a Correspondence with the greatest Enemies of the Government and Nation? The matter of Fact was too plain to be denied? And it was of that Nature which in the ordinary construction of the Law is Treason.

Here then was Guilt, here was Treason. And how then can there be *Innocent Blood*, and of that Malignity as to lie upon the Nation?

It must wholly rest then upon the Proof; *No Treason being proved upon me.* So that let the Malefactor be never so guilty, he may protest his Innocence, and charge the Guilt of *Innocent Blood upon the Nation*, if it is not in every Punctilio proved upon

upon him. And yet this is all his Innocence is supported upon, as appears by what follows, *viz. I return my most hearty Thanks to those Noble and Worthy Persons who gave me their Assistance, by opposing this Bill of Attainder; without which it had been impossible I could have fallen under the Sentence of Death.*

Why Impossible? Might he not expect as much Justice from both Houses of Parliament, as from the Ministers of Justice, and the Juries, in the Inferiour Courts? Had he not the Privilege of being heard by his Counsel, and the Favour of all that could be said in his behalf by those *Noble and Worthy Persons* that in both Houses were against the Bill? Was he not himself heard and re-heard to the very utmost, and had all the Advantages allowed that one that stood thus accused could, and more then he could reasonably, expect? Why was it then *Impossible*? The reason is evident, because the other Witness was withdrawn; and according to the late Act, one, in the ordinary Course of Law being not sufficient, how clear soever the proof otherwise was; therefore without the Bill of Attainder it was *Impossible*. And thus we see at last upon what point his profession of Innocency turns, and that he dies with the charge of the guilt of his *Innocent Blood upon the Nation*; and that is, because of the *Attainder*: and then all *Attainders* must be condemned; and if so, he is Innocent; but if that Course of Law is to be justified, as surely it is, (and has been before shewed) then he is guilty, and the Treason clearly and sufficiently *proved upon him*. So that upon the Whole, there is little else then Reservation and Equivocation; the Defence of which we leave to another Church, for that belongs not to the Church he professes to dye a Member of.

If we were to construe his words (if his they were, otherwise then he made them such by his owning of them) according to the Contrivance of the rest, which are so full of Ambiguity and abstruse and doubtful Meaning; those *Noble and Worthy Persons* who have his Thanks, are no more beholding to him, then the others he Charges with seeking his Life, when he saith of them, I am fully satisfied *they pleaded their own Cause when they pleaded*

pleaded mine. But what ever he meant, those *Noble and Worthy* Persons have given too great Assurances of being otherwise inclined, to have any thing of that Nature made use of to their Disadvantage.

He concludes with a Prayer; but it is too, a fixing upon himself the Fact he stood charged with and died for; it is for the Abdicated King, and the Spurious Prince; that is, for the maintaining of that Cause, which, he saith, he *endeavoured to his utmost Power to promote.*

Upon the Whole, it appears by his and his Friends Conduct, as well as by his Treasonable Practises, he had made it necessary to the Government to let the Sentence take effect. It was the Clemency of the Government that has emboldned the Enemies of it to proceed the more confidently in these Practises; and at length to conclude, that because it did not, that it therefore *durst not punish them.*

I know not how to conclude better then in the Words of Parliament, in their Late Act for better Security of His Majesty's Royal Person and Government; it saith, *They have been delivered from the Bloody and Barbarous Attempts of Traitors and others His Majesty's Enemies, who, there is just reason to believe, have been in great measure encouraged, to Undertake and Prosecute such, their wicked Designs, partly by His Majesty's great and undeserved Clemency towards them, and partly by want of a sufficient Provision in the Law for the Securing Offices and Places of Trust to such as are well affected to His Majesty's Government, and for the repressing and punishing such as are known to be disaffected to the same.*

The End.